DEFAMATION OR DISCOURSE?: RETHINKING THE PUBLIC FIGURE DOCTRINE ON THE INTERNET[†]

INTRODUCTION

Freedom of speech is one of the core liberties guaranteed to our citizens, immortalized in the Constitution and fiercely defended throughout history. This freedom has traditionally included expression through print, speech and even conduct. However, technological advancements, coupled with a substantial increase in access to the Internet, have created an unprecedented medium of expression with virtually no limits on the dissemination of ideas. In its early stages the Internet provided users with limited functions like access to email, messaging with friends and chat room dialogues, but this landscape has changed dramatically with the introduction of thread messaging, blogging and social networking sites. Virtually every person with a computer has the opportunity to engage in some form of online discourse—whether it be reconnecting with friends, making social commentary or engaging in politically volatile debates.

The expansive accessibility provided by the Internet has undoubtedly increased the ability of users to disseminate their ideas and opinions to wider audiences.[1] Further, many users rely on the anonymity that the Internet easily provides to express controversial, yet important, ideas that would otherwise bring disrepute. While online anonymity is valuable as it encourages the speaker to distribute his ideas freely, it is also dangerous as it widens the potential for cognizable legal harm to individuals in the form of online defamation. Thus, a

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[1] *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 894-95 (2000) ("One of the most significant ways in which the Internet promises to change the nature of public discourse is by allowing more participants to engage in the public discussion and debate. The Internet gives citizens inexpensive access to a medium of mass communication and therefore transforms every citizen into a potential 'publisher' of information for First Amendment purposes.") [hereinafter Lidsky, *Silencing John Doe*]; *see also* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1556 (2007) (describing how online anonymity has expanded public discussion to an unprecedented level).

problem arises in determining how the law should strike the proper balance between the individual's right to speak anonymously and the plaintiff's right to recover for reputational injury.

Further complicating the issue for courts are the civil procedure questions that arise from a lawsuit against an anonymous defamer. For instance, even assuming a person has a colorable claim for defamation, on whom does a plaintiff serve the summons when the speaker is anonymous? Plaintiffs generally have only one option: issue a John Doe Subpoena to the Internet Service Provider (ISP) and hope that the court will compel the disclosure of the identity of the anonymous speaker. Courts struggle, however, with the tension between a defendant's right to speak freely and anonymously under the First Amendment, and a plaintiff's right to recover for cognizable harms to his reputation arising from the defamatory statements.[2] This is important because in determining whether or not to compel the revelation of a defendant's identity, courts evaluate the sufficiency of the plaintiff's evidence against the backdrop of the speaker's Constitutional, yet qualified, right to anonymous speech.[3] The development of a uniform standard is imperative both to inform a potential plaintiff of his or her expected evidentiary burden and to provide online users with some guidance as to whether certain conduct will be subjected to liability. Further, without the clarity provided by a uniform standard, there is a significant risk that some forms of speech will be chilled, as potential online posters will refrain from speaking because they are unclear about the scope of their online rights.

Further complicating the issue is the application of the traditional public figure doctrine in the context of online defamation. Typically, the right to recover for defamation is determined by a two-part analysis that takes into consideration both the status of the plaintiff—as a private figure or public figure—and the harms created from the substance of the statements. The Supreme Court recognizes that the burden of proof for a defamation claim is less for a private individual

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[2] *See, e.g., In re* Subpoena Duces Tecum to Am. Online, Inc. (*In re* AOL), No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom*. Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001) (adopting a "good faith" standard); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999) (adopting a "motion to dismiss" standard); Dendrite Int'l, Inc. v. Doe, No.3, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) (adopting a "prima facie" standard with an additional Constitutional balancing factor); Krinksy v. Doe 6, 72 Cal. Rptr. 3d 231, 244 (Cal. Ct. App. 2008) (adopting the *Dendrite* "prima facie" standard, but eliminating the Constitutional balancing).

[3] *See* Lidsky & Cotter, *supra* note 1, at 1599 (describing the right to speak anonymously as a "qualified privilege" in the context of defamation).

than for a person who can be categorized as a public figure.[4] While the Court has not explicitly identified a set of concrete factors to determine whether someone is a public figure, it is clear that the voluntary aspect of the plaintiff's position is relevant to the analysis.[5] For example, the mayor of a city is a public official because he has voluntarily assumed the role by choosing to run for office, and as a consequence of his position, he is also susceptible to important political discourse. This discourse may lead to criticism of the mayor's character, reputation and ability to do his job. Under the public figure doctrine, if the mayor sought recovery for defamation, he would be subject to a heightened standard of proof to show that the defendant acted with "actual malice"—that the speaker knew the statement was false or simply did not care whether it was false or not.[6] In addition to voluntariness, the Court also justifies this heightened standard by recognizing that a public figure often has greater access to channels of communication that can be used to combat the defamatory speech than a private individual.[7]

Beyond the public figure doctrine, a minority of justices have argued that even some private individuals should be subject to the heightened actual malice standard if they have voluntarily engaged in conduct that involves a general or public issue.[8] For example, suppose a private citizen engages in anti-abortion protests on a college campus, which causes the school newspaper to write an editorial piece questioning this person's sanity. Under this expanded version of the public figure doctrine, the private individual would have to show that the editorial writer acted with actual malice, instead of the traditionally lower standard for defamation because the protestor voluntarily injected himself into the discussion of a public issue.

The traditional public figure doctrine, as formulated through Supreme Court jurisprudence, is unable to meet the needs of the Internet. In an age where virtually anyone can create an online profile and a video can go "viral" in a matter of hours, it is exceedingly difficult to

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[4] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-83 (1964) (accepting, for the first time, a different standard for plaintiffs who have assumed the role as a public official in a defamation action).

[5] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (stating that "[t]hose who, by reason of notoriety of their achievements or vigor and success with which they seek the public's attention, are properly classed as public figures….").

[6] *Sullivan*, 376 U.S. at 279-80.

[7] *Gertz*, 418 U.S. at 344 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication [than private individuals] and hence have a more realistic opportunity to counteract false statements….").

[8] *See id*. at 361-69 (Brennan, J., dissenting).

analyze whether an individual, through his online activity, has voluntarily assumed the public spotlight and accompanying criticism such that he should be subject to the actual malice standard in a defamation suit. The Supreme Court has yet to consider defamation in the Internet context, and it is unclear whether it will continue to use the traditional public figure doctrine framework, or move towards a theory of First Amendment protection that has a greater focus on whether the disputed statements deal with a general or public issue.

Against this backdrop, the need for a consistent standard for dealing with online defamation suits is necessary to ensure appropriate protection of First Amendment interests. Part II of this Note describes various forms of online discourse and the typical problems that arise in classifying Internet speech as defamatory. Part III considers the Constitutional right to anonymous speech, the emergence of John Doe Subpoenas and a brief description of the various tests adopted by courts to deal with the complexities of this procedural mechanism. Part IV examines the traditional public figure doctrine and discusses the general or public interest framework. Part V advocates for a shift in the classification of public figures, limited-purpose public figures, and private individuals in the Internet context. Under the proposed Internet public figure doctrine, courts would focus on an expanded view of limited-purpose public figures and consider whether the disputed speech relates to an issue of general or public interest before compelling the disclosure of the identity of an alleged defamer.

I. ONLINE DISCOURSE

The Internet provides a remarkable forum in which individuals are able to engage in discussions with other users around the globe from the privacy of their own homes and computers. Additionally, the Internet has supplanted the former primacy of many mass media outlets—newspapers, magazines and books—with a new a medium of mass communication that allows all users with an Internet connection to engage in public discourse.[9] Under traditional modes of communication, individuals are often prevented from expressing their opinions and ideas because of the ability for the outlet to stand as the gatekeeper between the speaker and the audience.[10] For example, an individual might submit a letter to the local newspaper describing his outrage regarding some municipal initiative. Within this letter, the citizen may

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[9] *See* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe ?*, 50 B.C.L. REV. 1373, 1375 (2009) [hereinafter Lidsky, *Anonymity in Cyberspace*].

[10] *Id.*

use strong language, criticize public officials and call for some action to change the policy. However, this letter may never reach its intended audience because the editor may decide not to publish it based on the content and language, or simply because there is no room in the issue. This example has an entirely different outcome in the Internet context because there is virtually no impediment to the citizen's ability to deliver his message. He could take the same letter and post it in a chat room or on another online forum without having to first submit the content to an editor or publisher. In essence, the citizen acts as his own online editor or publisher and is free to choose when, where and what ideas to convey to his audience.

Some commentators argue that the increased ability to reach a mass audience results in a democratization of discourse because the Internet makes it more difficult "for those in power to control the interpretation of public events."[11] For example, the citizen in the hypothetical above can disseminate his message as often and to as many people as he wants by reposting the letter on different websites. Because free Internet access is available at many locations, the citizen does not need money or status to participate in important political discourse and debate—a right which is at the core of First Amendment protections[12] regardless of the medium. Thus, it is important to consider this right in the context of online defamation claims because with the continuing decline of many traditional mediums, specifically newspapers, the opportunity for online public debate is even more salient.

Obviously not all Internet discourse involves valuable debate of public or political issues. Because a speaker can create inflammatory posts anonymously, the Internet provides a cloak of secrecy that can encourage speech that is not within the traditional bounds of public debate and discourse. Online defamation, however, can have real life consequences for victims, including damage to reputation, diminished

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[11] *Id.; see also* Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 323 (2008) (comparing the ability of pamphleteer to deliver his message with the access the Internet gives users to reach millions of readers with the click of a button).

[12] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (citing Justice Brandeis' concurrence in Whitney v. California, 275 U.S. 357, 375-76 (1927) for the proposition "[t]hose who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government….Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.").

job prospects, and even serious emotional harm.[13] For example, in *Doe 1 v. Individuals*, a Connecticut case involving the website AutoAdmit, an Internet user posted harassing, threatening and defamatory remarks about two female Yale law students on a website designed to create an anonymous forum for undergraduate and professional students.[14] The posts contained extremely derogatory remarks about the students, including references to sexual relations with family members, sexually transmitted diseases, and even advocating for the rape of the students.[15] While other areas of the AutoAdmit website clearly fall within the ambit of valuable public discourse—for example, providing opinions and evaluations of educational institutions—the derogatory, threatening and slanderous statements regarding these individuals fall outside the category of high value First Amendment speech.

The demarcation between speech related to public discourse and speech for the purposes of degradation and harassment is not always as clear as it was in the AutoAdmit case. As illustrated in the introduction, the anonymity of the Internet is often the catalyst that causes some speakers to engage in valuable discourse that he or she may not have otherwise participated in. Because the line between valuable and slanderous speech is not always clear, courts should be leery of permitting a broad recovery for defamation. To ensure Constitutional protection, courts should move away from the traditional approach in relying on the public figure doctrine because it does not adequately address the complex issues arising from online anonymous speech.[16]

Consider the following hypothetical based on the AutoAdmit case: what if the Yale Law students made a post on AutoAdmit arguing that Yale should eliminate the ROTC program on campus because of the "Don't ask, Don't tell" policy regarding gay and lesbian military service. And instead of making threats of violence, the defaming user referred to the students as closeted lesbians. On one hand, the statement could be considered slander because it is untrue and could possibly do harm to the students' reputation or job prospects. On the other hand, the students voluntarily injected themselves into an important public issue—gay and lesbian rights—by posting on the

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[13] Jason C. Miller, *Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPS in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL'Y 229, 231 (2008).

[14] Doe I v. Individuals (AutoAdmit.com), 561 F. Supp. 2d 249, 251 (D. Conn. 2008). The Yale law students eventually accepted an undisclosed settlement from the defendant who was subsequently identified.

[15] *Id.*

[16] See discussion *infra* Section V.

website and the user's comments are related to important political discourse.

This Note highlights the unique problems arising from the increase in online discourse and advocates a shift away from the traditional public figure doctrine to focus on whether the plaintiff voluntarily assumed a role in a public issue.

II. RIGHT TO ANONYMOUS SPEECH AND JOHN DOE SUBPOENAS

A. Anonymous Speech

The Supreme Court has recognized the right to speak anonymously as a constitutionally protected right.[17] In *McIntyre v. Ohio*, Margret McIntyre distributed handbills opposing a school tax referendum at a local meeting. Instead of signing her own name to the handbills, she chose to sign in the name of "CONCERNED PARENTS AND TAX PAYERS."[18] In response, the Ohio Elections Committee fined McIntyre $100 for violating an Ohio elections law that prohibited the distribution of election materials "unless there appear[ed] on such form of publication…the name and residence" of the person responsible for the material.[19] In considering the constitutionality of this restriction, the Supreme Court held that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[20]

The *McIntyre* holding is predicated on two grounds: utilitarian considerations and individual autonomy.[21] First, the Court considered the importance of anonymous speech to political discourse and literature noting that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[22] In support of the marketplace of ideas rationale for First Amendment protection,[23] the

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[17] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).

[18] *Id.* at 337.

[19] *Id*. at 338 n.3 (citing OHIO REV. CODE ANN. §3599.09(A) (1988)).

[20] *Id.* at 342.

[21] Lidsky & Cotter, *supra* note 1, at 1542-43.

[22] *McIntyre*, 514 U.S. at 342.

[23] The search for truth or "marketplace of ideas" rationale for the protection of free speech or free expression rests on the idea that "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the

Court concluded, "[a]nonymity is a shield from the tyranny of the majority,"[24] which protects a full and robust public discourse by promoting the discussion of both popular and unpopular opinions. Thus, the Court saw the protection of anonymous speech as a necessary safeguard to foster the contributions of valuable information to the marketplace of ideas.[25] Because protecting anonymity allows an author to disseminate a variety of ideas without fear of repercussions, the public as a whole benefits by the increased availability of diverse information in the marketplace.[26]

The second ground for the *McIntyre* decision concerned an author's autonomous right to speak anonymously.[27] The Court noted that "an author is generally free to decide whether or not to disclose his or her true identity"[28] and identification requirements, like the Ohio elections law, automatically destroy this personal choice. Requiring identity disclosure discourages authors from engaging in potentially controversial speech because it requires the author to reveal "the content of [his or her] thoughts on a controversial issue."[29] Thus, recognizing that the First Amendment protects authorial autonomy allows an individual to choose whether or not to assume ownership over unpopular ideas, which promotes the underlying free speech right to engage in public discourse.

McIntyre concerned the right to anonymous speech involving political debate and discourse through distribution of unsigned handbills. And while the Supreme Court has not yet considered the issue of anonymous speech on the Internet directly, it has recognized that traditional concepts of First Amendment protection apply equally on the Internet.[30] For instance, in *Reno v. ACLU* the Court noted there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]," because the Internet is a "dynamic, multifaceted category of communication [that] in-

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only ground upon which their wishes safely can be carried out." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[24] *McIntyre*, 514 U.S. at 357.

[25] Lidsky & Cotter, *supra* note 1, at 1542.

[26] For example, authorial anonymity allowed James Madison, Alexander Hamilton and John Jay to publish the Federalist Papers without fear of repercussion from the British Crown. *See McIntyre*, 514 U.S. at 343 n.6.

[27] Lidsky & Cotter, *supra* note 1, at 1543.

[28] *McIntyre*, 514 U.S. at 341.

[29] *Id.* at 355; *see also* Lidsky & Cotter, *supra* note 1, at 1543.

[30] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 868, 870-71 (1997) (The Supreme Court applied traditional First Amendment principles to invalidate two sections of the Communications Decency Act of 1996 that were designed to protect minors from "indecent" and "patently offensive" communications over the Internet.); *see also* Gleicher, *supra* note 11, at 326.

cludes…traditional print and news services…audio, video, and still images, as well as interactive, real-time dialogue."[31] The Court expressly recognized the importance of speech on the Internet, noting that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[32]

Because the Supreme Court has recognized a Constitutional right to anonymous speech and has indicated that First Amendment protections extend to the Internet, it follows that the First Amendment also likely protects the right to anonymous speech on the Internet. However, while the right to anonymous speech is vast, it is not without limitation. One such limitation arises when the right to speak anonymously conflicts with an individual's right to recover for defamation.[33] In the context of online defamation suits, courts have struggled with striking a balance that adequately protects the speaker's right to anonymity and the individual's right to recover for reputational injury.[34] The manifestation of these competing interests arises when a court must consider whether to compel the disclosure of the identity of an alleged online defamer through the procedural mechanism referred to as the John Doe Subpoena.

B. John Doe Subpoena

Because of the vast accessibility of the Internet and the incalculable amount of users, many plaintiffs seeking redress for online defamation are often unable to identify an anonymous poster. It is common for a plaintiff to move for a discovery subpoena against the Internet Service Provider (ISP), on which the allegedly defamatory material was posted, in order to uncover the identity of the defamer.[35] The initial subpoena may only reveal the Internet Protocol (IP) address linked to a particular site, and plaintiffs may have to file a secondary subpoena seeking the contact information associated with the

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[31] *Reno*, 521 U.S. at 870.

[32] *Id.*

[33] Lidsky & Cotter, *supra* note 1 at 1595 ("Some courts have simply found the anonymous speaker's rights unworthy of protection once the plaintiff has alleged the speech is tortious.").

[34] *See id.* at n. 256 (noting various cases that have attempted to strike a balance between the plaintiff's and defendant's rights in a claim for online defamation).

[35] Ashley I. Kissinger & Katharine Larsen, *Shielding Jane and John: Can the Media Protect Anonymous Online Speech?,* COMM. LAW., July 2009, at 4 [hereinafter Kissinger & Larsen, *Shielding Jane and John*].

computer using the identified IP address.[36] These procedural mechanisms are virtually the only tools available for plaintiffs to identify their alleged defamer. Thus, the standards used by courts in considering whether to compel identification have serious implications for the defendant's right to speak anonymously.[37] Beyond tort recovery, some commentators have expressed concern that plaintiffs often have extra-judicial motivations for using a John Doe Subpoena. They note that plaintiffs may use the subpoenas to "unmask[ ] defendants who have said nothing actionable [in order to] 'simply seek revenge or retribution.'"[38] However, without John Doe Subpoenas some plaintiffs would never be able to identify their defamer despite having a colorable defamation claim. In struggling with this tension, courts approach the merits of John Doe Subpoenas in varying ways, resulting in a litany of different tests across jurisdictions.

C. Different Tests

The Supreme Court and the federal Courts of Appeals have yet to adopt a uniform approach for balancing the plaintiff's right of reputational redress and the defendant's right to anonymous speech.[39] Instead, the lower courts have experimented with a variety of standards to determine whether a plaintiff has met his or her burden, and thus is entitled to uncover the identity of the alleged defamer.[40] These standards can be divided into roughly three categories reflecting the evidentiary burden the court requires of a plaintiff in seeking a John Doe Subpoena: good faith, motion to dismiss, and prima facie/summary judgment.

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[36] Gleicher, *supra* note 11, at 328 ("Only the ISP knows what IP address was attached to which computer at any given time. Thus, the plaintiff must file another subpoena targeting the poster's ISP, seeking the address, telephone number, and other contact information....").

[37] *Id.* ("Because John Doe subpoenas are the central tool for litigation in this area, the standard that governs them effectively determines the breadth of the right to anonymous speech on the Internet."); *see also* Lidsky & Cotter, *supra* note 1, at 1595 ("If all it takes is an allegation of defamation to uncover a defendant's identity, the right to speak anonymously is very fragile indeed, because it is easy for a plaintiff to allege defamation any time he comes in for harsh criticism online.").

[38] Gleicher, *supra* note 11, at 328-29 (quoting Doe No. 1 v. Cahill, 884 A.2d 451, 457 (Del. 2005)); *see also* Lidsky, *Anonymity in Cyberspace*, *supra* note 9, at 1377 (noting that these tests "are designed to sort legitimate defamation actions from 'cyberslapps'—unfounded suits designed only to chill speech—at an early stage of the discovery process").

[39] Kissinger & Larsen, *Shielding Jane and John*, *supra* note 35 at 5.

[40] *Id.* ("The critical element in each of the tests articulated by the courts is the degree of burden imposed on the plaintiff to demonstrate the viability of his or her case before the anonymous poster will be unmasked.").

1. Good Faith Showing

The "good faith basis" standard developed in *In re Subpoena Duces Tecum to America Online, Inc.*[41] is the least speech protective standard and remains the minority approach.[42] America Online (AOL) sought to quash a subpoena from a company seeking the identities of five alleged defamers who made posts in an Internet chat room, which AOL vigorously defended on First Amendment grounds.[43] In reviewing the subpoena, the court considered three factors: (1) whether the court is satisfied with the strength of the evidence presented, (2) whether the party requesting the subpoena had a "good faith basis" to believe the claim was actionable, and (3) whether the defendant's identity is necessary to proceed with the claim.[44]

To illustrate the good faith standard, consider the following example: a school teacher is not given tenure because there are online allegations that her nontraditional teaching style is the result of her abuse of illegal drugs. The comments are posted on a popular blog for students and faculty. The teacher attempted to respond to the blog posts by denying the accusations, but the anonymous user continues to post comments under the screen name Xtacy45. In order to vindicate her name and reputation, she seeks a John Doe Subpoena to compel the name of her alleged defamer. Under the good faith standard, the court would determine whether the teacher has a good faith belief that her claim is actionable, which seems easily met by her failure to get tenure and her willingness to pursue her alleged defamer (an actual drug abuser would arguably not go this far). Further, it is hard to imagine a scenario in which the identity of the alleged defamer would be unnecessary for the lawsuit to proceed because without this information it would be very difficult to serve process and disprove the con-

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[41] *In re* Subpoena Duces Tecum to Am. Online, Inc. (*In re* AOL), No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom.* Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

[42] *See* Gleicher, *supra* note 11 at 350-51 ("A good faith standard provides little if any protection for defendants. Because the unmasking of a defendant's identity can cause significant harm and deter other anonymous speakers from entering public debate, defendants deserve more than merely symbolic protection.); *see also Kissinger* & Larsen, *Shielding Jane and John*, *supra* note 35 at 8 (describing how the good faith test "has been largely distinguished or rejected by courts addressing claims involving expressive speech").

[43] *In re AOL*, 2000 WL 1210372, at *2 ("AOL contends that the *subpoena duces tecum*…unreasonably impairs the First Amendment right of the John Does to speak anonymously on the Internet….").

[44] *Id.* at *8.

tent of the statements.[45] Thus, it appears that the teacher could easily compel the identity of her alleged defamer. This conclusion causes some courts and commentators to reject this approach as not adequately protective of the right to anonymous speech.[46]

2. Motion to Dismiss

In *Columbia Insurance Co. v. Seescandy.com*, decided prior to *In re AOL*, the court required the plaintiff to meet a slightly higher burden before it would uncover the identity of two defendants in an action for trademark infringement and dilution.[47] A California Federal District Court held that in order to compel disclosure of the defendant's identity the plaintiff must: (1) sufficiently identify the defendant for jurisdiction purposes, (2) identify any steps taken to locate the defendant, (3) demonstrate that the facts alleged could withstand a motion to dismiss, and (4) demonstrate that the information sought (the defendant's identity) would be relevant to the claim asserted.[48] The court further explained that under the motion to dismiss standard, the pleadings must rise above mere conclusory statements. It required the "plaintiff [to] make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act."[49]

In applying this standard to the hypothetical provided above, the teacher would have to first demonstrate that her alleged defamer is a real person who is subject to suit in the court where she filed the complaint. Because the user specifically responded to her posts with more allegedly defamatory comments, it is likely that the user is a real person who is subject to suit in the jurisdiction. Second, the teacher would have to identify any good faith attempts to locate the defendant, which again is demonstrated by her interaction with the user on the blog. Third, the teacher would have to allege sufficient facts to withstand a hypothetical motion to dismiss. Thus, she would have to plead facts that support a prima facie case entitling her to relief, which the

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[45] *See* Jessica L. Chilson, Note, *Unmasking John Doe: Setting a Standard for Discovery in Anonymous Internet Defamation Cases*, 95 VA. L. REV. 389, 410 (2009) (highlighting the deficiencies in the good faith test and the relative ease in which plaintiffs can satisfy the requirements).

[46] *See, e.g.*, Doe No. 1 v. Cahill, 884 A.2d 451, 458 (Del. 2005) ("In our view, this 'good faith' standard is too easily satisfied to protect sufficiently a defendant's right to speak anonymously."); *see also* Gleicher, *supra* note 11 at 350-51.

[47] Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

[48] *Id.* at 578-80.

[49] *Id.* at 580.

court in *Seescandy.com* predicated on a showing of civil liability and discovery targeted at revealing a defendant who is potentially liable.[50] The anonymous defendant claimed the teacher was a drug user and under this standard, the teacher would need to plead facts establishing that she is not a drug user, which if proven would entitle her to relief for defamation. She would also have to demonstrate that the subpoena would reveal the name of the person responsible for the comments, meaning that in all likelihood the ISP provider would be able to provide contact information for the user. Because a single individual with the username Xtacy45 wrote all the comments regarding the teacher's alleged drug use, the court would likely find her subpoena sufficiently targeted at revealing the specific defendant. Based on the foregoing, the teacher would likely have little difficulty meeting the demands of the motion to dismiss test.

3. Prima Facie Showing / Summary Judgment Standard

A more speech protective approach towards John Doe Subpoenas is demonstrated in several cases beginning with *Dendrite International, Inc. v. Doe, No. 3*.[51] In *Dendrite*, a company sought the identity of an anonymous poster who allegedly made defamatory statements about their business practices on a Yahoo! bulletin board. Even though *Seescandy.com* did not involve the defendant's First Amendment rights,[52] the *Dendrite* motion judge found the *Seescandy.com* court's treatment of the unique aspects of the Internet particularly applicable in choosing to adopt the motion to dismiss standard.[53] The Appellate Division, however, found the motion to dismiss standard to be insufficiently protective of First Amendment concerns and held that the "application of [the] motion-to-dismiss standard in isolation fails to provide a basis for analysis and balancing of *Dendrite's* request for disclosure in light of John Doe No. 3's competing right of anonymity in the exercise of his right of free speech."[54] Instead, the court determined that the plaintiff must demonstrate a prima facie case

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[50] *Id.*

[51] Dendrite Int'l, Inc. v. Doe, No.3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[52] *See* discussion *supra* part III.B.2.

[53] *See Dendrite*, 775 A.2d at 766 ("In light of free speech and defamation considerations, as well as the fact that the Internet played a role in this dispute, the motion judge relied on the case of *Columbia Ins. Co., v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) to resolve whether he should permit Dendrite to conduct discovery to ascertain John Doe No. 3's identity.").

[54] *Id.* at 770.

before it would compel disclosure of the defendant's identity.[55] In addition to the prima facie showing, the *Dendrite* court added two additional elements to the analysis: (1) a plaintiff must attempt to notify the defendant and give the anonymous poster a reasonable time to respond,[56] and (2) a balancing factor, which requires the court to consider "the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure…to allow the plaintiff to properly proceed."[57] The *Dendrite* test is now considered the dominant standard among courts in considering John Doe Subpoenas.[58]

Despite the general acceptance of the *Dendrite test*, the court in *Doe No. 1 v. Cahill*[59] chose to abandon the additional balancing factor and instead required the plaintiff to make an evidentiary showing sufficient to survive a hypothetical motion for summary judgment before it would compel the name of the anonymous poster.[60] In *Cahill*, a town council member and his wife brought a defamation claim against four John Doe defendants for posts alleging Cahill's diminished mental capacity on an Internet blog.[61] In rejecting the full *Dendrite* analysis, the court determined that the summary judgment test itself was enough of a balance of defendant's First Amendment rights and that the additional balancing factor was unnecessary.[62] In support of the *Cahill* decision, some commentators argue that if a plaintiff is able to make an evidentiary showing that a defamation claim is actionable, then there is no need to balance the interest of the alleged defamer because the scales are tipped in favor of allowing recovery for reputational injury.[63] However, some courts and critics view the decision as

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[55] *Id*. at 760 ("The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants.").

[56] *Id.* (The court explained that "[t]hese notification efforts should include posting a message of notification of the [subpoena] to the anonymous user on the ISP's pertinent message board.").

[57] *Id.* at 760-61.

[58] Lidsky, *Anonymity in Cyberspace*, *supra* note 9, at 1378.

[59] Doe No. 1 v. Cahill, 884 A.2d 451 (Del. 2005).

[60] *Id.* at 461 ("[The balancing factor] adds no protection above and beyond that of the summary judgment test and needlessly complicates the analysis. Accordingly, we adopt a modified *Dendrite* standard….").

[61] *Id.* at 454.

[62] *Id.* at 461.

[63] *See* Lidsky, *Anonymity in Cyberspace*, *supra* note 9, at 1380 ("Under the prima facie evidence standard, the defendant's right to speak anonymously outweighs the plaintiff's right to pursue a libel action unless and until the plaintiff presents evidence that the libel claim is viable; once this burden is met, the balance tips in favor of allowing plaintiff to pursue a claim for vindication of her reputation. An explicit balancing test serves only to tilt the scales further toward the protection of anonymous

overemphasizing a procedural mechanism that varies across jurisdictions and thus prevents plaintiffs from being able to predict the required evidentiary burden for recovery.[64]

Finally, in *Krinsky v. Doe 6*, a corporate executive brought a defamation claim against ten anonymous defendants who made allegedly defamatory statements on a Yahoo! message board.[65] In fashioning a standard, the court combined elements of both the *Dendrite* and *Cahill* standards. The court determined that requiring a plaintiff to undertake reasonable steps to notify a defendant, an element present in both standards, was not "unduly burdensome."[66] In analyzing plaintiff's evidentiary burden, *Krinsky* embraced the prima facie showing element from *Dendrite*.[67] Similar to the rationale in *Cahill*, the court further noted that if the plaintiff has a factual basis to support an actionable claim then "balancing of interests should not be necessary to overcome defendant's constitutional right to speak anonymously."[68] This piecemeal analysis has led some commentators to refer to the *Krinsky* standard as the "*Cahill-Dendrite*" standard.[69]

4. Critical Response to the Various Tests

The lack of a uniform standard of review for John Doe Subpoenas has produced a broad range of results, which reduces both the plaintiff's and the defendant's ability to predict whether certain conduct will result in the loss of anonymity and be subject to civil liability. The disagreement among commentators focuses primarily on what type of evidentiary burden is required of a plaintiff before a court will compel the disclosure of the identity of an alleged defamer. Further, some critics worry that even assuming the courts adopt a uniform evi-

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speech because presumably it allows even a viable defamation claim to be dismissed on the ground that it is not strong enough to outweigh defendant's First Amendment interests.").

[64] *See, e.g.*, Krinksy v. Doe 6, 72 Cal. Rptr. 3d 231, 244 (Ct. App. 2008) ("We find it unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet."); *see also* Kissinger & Larsen, *Shielding Jane and John*, *supra* note 35, at 6.

[65] *Krinsky*, 72 Cal. Rptr. 3d at 235.

[66] *Id.* at 244.

[67] *Id.* at 245 ("We therefore agree with those courts that have compelled the plaintiff to make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity.").

[68] *Id.* at 245-46.

[69] Gleicher, *supra* note 11, at 342.

dentiary burden for plaintiffs, the procedural differences across jurisdictions will still produce inconsistent results.[70]

Courts and commentators generally agree that the good faith standard proposed in *AOL* does not adequately protect important First Amendment rights.[71] In *AOL*, the court did not clearly define what constitutes a "good faith" showing, noting that a plaintiff must demonstrate "a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where the suit was filed."[72] Critics argue the test provides no concrete guideline for courts in determining whether or not to compel a defendant's identity, and does not allow for consideration of whether a defendant is exercising a legitimate privilege to speak anonymously about a matter in the public discourse. For example, in the teacher hypothetical above, the teacher would be able to satisfy this low threshold and reveal her alleged defamer, even if her defamation claim is not very strong or if she does not actually intend to pursue her claim, as long as she has a good faith belief that her claim is actionable. Thus, this standard would allow the teacher to expose the user, engage in non-judicial retaliation, and even worse, potentially deter other speakers from engaging in important public debate regarding education practices.

Commentators also criticize the motion to dismiss standard developed in *Seescandy.com*, which requires plaintiff to allege enough facts to "establish to the Court's satisfaction that the plaintiff's suit against defendant could withstand a motion to dismiss."[73] The court further clarified that the motion to dismiss standard required more than mere conclusory pleadings and was "akin to the process used during crimi-

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[70] *See, e.g., id*. at 351-52 ("Transforming [the motion to dismiss test] into a national standard also poses another problem: John Doe Subpoenas arise not only in federal court but also in state courts across the country. The showing necessary for a plaintiff to survive a motion to dismiss varies from state to state.").

[71] *See Krinsky*, 72 Cal.Rptr, 3d at 241 ("[The good faith standard] offers no practical, reliable way to determine the plaintiff's good faith and leaves the speaker with little protection."); Doe v. Cahill, 844 A.2d 451, 458 (Del. 2005) (rejecting the lower court's reliance on the AOL "good faith" test because it did not adequately protect a defendant's right to speak anonymously); *see also* Gleicher, *supra* note 11, at 350-51 (describing the risk that a low threshold for plaintiffs leads to "mere[] symbolic protection" for defendants); Kissinger & Larsen, *Shielding Jane and John*, *supra* note 35, at 7 (noting that the "good faith" standard "provides no special protection for anonymous speech" and is akin to expedited discovery under the Federal Rule of Civil Procedure 26(d)) (footnote omitted).

[72] *In re* Subpoena Duces Tecum to Am. Online, Inc. (*In re* AOL), No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom.* Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

[73] Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999).

nal investigations to obtain warrants" (i.e., requiring probable cause).[74] Despite placing a seemingly higher burden on plaintiffs, commentators argue that this threshold puts a defendant's First Amendment rights in the hands of a procedural mechanism that is not settled at the federal level or consistent across the states.[75] Thus, a plaintiff may be subject to a different evidentiary threshold depending on whether he or she decided to file in state court or in federal court. This inconsistency may create a perverse incentive for the plaintiff to file in a state jurisdiction where there is the lower motion to dismiss standard and could lead to forum shopping.[76] Because there is variance across the jurisdictions on what a plaintiff must allege in order to compel the disclosure of the identity of an alleged defamer, and there is an incentive to file in a lenient jurisdiction, the motion to dismiss standard inadequately protects the defendant's interest in anonymity and is an undesirable basis for a uniform standard.

Similarly, the motion for summary judgment test is also grounded in a procedural mechanism that requires a plaintiff to make a different evidentiary showing depending on the specific jurisdiction where the claim is filed. In *Krinksy*, the court specifically addressed this criticism noting, "[w]e find it unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet."[77] The court further clarified the difficulty of assigning a procedural label, stating that defamation cases "may relate to actions filed in other jurisdictions, which may have different standards governing pleadings and motions; consequently, it could generate more confusion to define an obligation by referring to a particular motion procedure."[78] Although the summary judgment standard sets a higher burden than the motion to dismiss

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[74] *Id.*

[75] *See* Gleicher, *supra* note 11, at 352 ("Relying on a motion to dismiss label to evaluate John Doe subpoenas would create an inconsistent, uncertain standard that varied not based on jurisdictions' rulings or the plaintiffs' substantive claims, but on procedural standards that were never intended to govern anonymous speech."); Ashley I. Kissinger & Katharine Larsen, *Untangling the Legal Labyrinth: Protections For Anonymous Online Speech*, 13 No. 9 J. INTERNET L. 1, 20 (2010) (describing variation among states in applying the motion to dismiss standard to John Doe Subpoenas) [hereinafter Kissinger & Larsen, *Untangling the Legal Labyrinth*]; *see generally* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twom*bly, 14 LEWIS & CLARK L. REV. 15 (2010) (discussing the unsettled state of the motion to dismiss standard after the Supreme Court's decision in *Ashcroft v. Iqbal*).

[76] *See* Gleicher, *supra* note 11, at 352.

[77] Krinksy v. Doe 6, 72 Cal. Rptr. 3d 231, 244 (Ct. App. 2008).

[78] *Id.*

standard, and is thus arguably more speech protective, this threshold is inappropriate because the evidentiary burden required under a summary judgment motion still depends on the civil procedure rules of the particular state, and thus cannot provide a sound basis for a uniform standard.

After the decisions in *Dendrite* and *Cahill*, there appears to be an emerging consensus among courts and commentators that requiring a plaintiff to make a prima facie showing that the underlying claim is actionable is the preferable standard for reviewing John Doe Subpoenas in online defamation suits.[79] At least one commentator notes that while there is still variation in both the substantive law and evidentiary burden across jurisdictions, the variation does not raise the same issues as the motion to dismiss or summary judgment standards because the definition of a "prima facie showing" does not vary; instead, it is the specific elements that a plaintiff must satisfy that vary.[80] For example, a prima facie showing means the same thing in different states even though the specific elements of defamation may be different.[81] Thus, the prima facie showing is a more desirable standard because it provides a certain level of uniformity while allowing for variances in substantive state law.

Despite a burgeoning general acceptance of the prima facie formulation, there is still considerable disagreement about whether courts should engage in a final balancing of a defendant's First Amendment rights against the strength of the plaintiff's case.[82] Some commenta-

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[79] *See, e.g.*, Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 456 (Md. 2009) (adopting *Dendrite* and requiring the plaintiff to make a prima facie showing of defamation); *Krinsky*, 72 Cal.Rptr.3d at 244-45 (adopting a prima facie showing standard for reviewing John Doe Subpoenas); *see also* Kissinger & Larsen, *Shielding Jane and John*, *supra* note 35, at 5-6 (describing the shift from the summary judgment formulation of Cahill towards the prima facie standard described in Dendrite); Lidsky, *Anonymity in Cyberspace*, *supra* note 9, at 1378 (noting that the prima facie case is becoming the dominant standard).

[80] *See* Gleicher, *supra* note 11, at 354.

[81] *Id.* ("For example, a prima facie claim of libel in Florida requires that the plaintiff show that 'the defendant published a false statement about the plaintiff to a third party and that the false statement caused injury to the plaintiff.' By contrast, in Delaware, proving libel requires the plaintiff to show that '1) the defendant made a defamatory statement; 2) concerning the plaintiff; 3) the statement was published;…4) a third party would understand the character of the communication as defamatory[; and] 5) the statement is false.' The meaning of prima facie showing [however] does not differ among the jurisdictions….") (citations omitted).

[82] *Compare* Dendrite Int'l, Inc. v. Doe, No. 3, 775 A. 2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) ("[A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's

tors argue that the balancing approach is necessary because it allows the court to consider the broader consequences of the subpoena, such as retaliation against a defendant if his identity is revealed.[83] Once plaintiff has met her prima facie burden, it is not entirely clear what types of potential consequences would require the court to intervene and protect a defendant's identity. However, it seems clear that threats of severe bodily harm or death would certainly qualify.[84] Critics of this approach argue that the balancing test is counterproductive to the goals of predictability and protection of First Amendment rights because it would provide judges with discretion to decide whether or not to reveal defendant's identity despite plaintiff's apparently viable claim.[85]

Because the main focus of this Note is a formulation of an Internet public figure doctrine,[86] it is not entirely necessary to resolve whether courts should consider a final balancing element. On one hand, the balancing test could resolve important issues, such as the harmful effects on the defendant if his identity is revealed and the

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identity to allow the plaintiff to properly proceed."), *and* Moblisa, Inc. v. Doe, 170 P.3d 712, 720 (Ariz. Ct. App. 2007) (rejecting *Cahill's* elimination of the balancing step stating, "[i]n our view, requiring the court to balance the parties' competing interests is necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech"), *with* Doe No. 1 v. Cahill, 884 A.2d 451, 461 (Del. 2005) (holding that portions of the *Dendrite* balancing test were unnecessary because it "adds no protection above and beyond that of the summary judgment test and needlessly complicated the analysis").

[83] *See* Lidsky & Cotter, *supra* note 1, at 1601-02 ("If a plaintiff is able to overcome the defendant's privilege to speak anonymously, the defendant should have a final opportunity to convince the judge, in camera, that the magnitude of harm she faces if her identity is revealed outweighs the plaintiff's need for her identity….Although a defendant would rarely be able to establish a threat of sufficient magnitude to outweigh plaintiff's need for defendant's identity, this last component of the privilege analysis serves as a final piece of insurance that defendant's right to speak anonymously is not too lightly compromised."); *see also* Gleicher, *supra* note 11, at 361 (describing the flexibility the balancing factor gives courts to consider the effects of the subpoena on the defendant).

[84] *See* Lidsky & Cotter, *supra* note 1, at 1601; Gleicher, *supra* note 11, at 361.

[85] Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 808 (2004) (criticizing the fact "that, even if plaintiff has alleged a viable legal claim against the defendant—and supported that claim with admissible evidence—the court may still exercise discretion to stop the case in its tracks, at least to the extent that the 'strength of the prima facie case' is given less weight than 'the defendant's First Amendment right of anonymous free speech.'") (citation omitted).

[86] Under the Internet public figure doctrine, certain plaintiff's would have to make a prima facie showing to establish "actual malice" in their defamation claims, which would arguably eliminate the need for a final balancing except in the limited situations described above. *See* discussion *infra* Section V.

importance of the type of speech at issue. On the other hand, adopting a balancing element is counterproductive to creating a uniform system where both plaintiffs and defendants can predict whether certain conduct will result in liability because the ultimate decision is subject to judicial discretion. At the very least, the court should be permitted to conduct an in camera review of the plaintiff's motion in considering the potential consequences of revelation for the defendant and the nature of the speech at issue. The in camera review would reduce the harmful effects of revealing the defendant's identity in open court. Further, like other discretionary standards, this process would be subject to review under an abuse of discretion standard. While this proposal does not completely eliminate the unpredictability associated with the review of John Doe Subpoenas, courts should only intervene in cases where there is a demonstrable need.

III. DEFAMATORY SPEECH AND THE PUBLIC FIGURE DOCTRINE

Plaintiffs use John Doe Subpoenas as a procedural mechanism to uncover the identity of defendants in a variety of legal contexts, including, defamation, trademark infringement and trespass to chattels.[87] However, this Note focuses solely on the unique problems arising in Internet defamation claims. In all defamation claims, how the plaintiff is classified under the public figure doctrine is a critical determination. This is especially important in the context of John Doe Subpoenas for online defamation because when deciding whether or not to compel the identity of an anonymous defendant, courts rely on the strength of the plaintiff's factual allegations. If the plaintiff is classified as a public figure, then the plaintiff must meet a heightened pleading standard, alleging that the defendant acted with actual malice.[88]

Generally, in order to demonstrate liability for defamation, a private plaintiff must establish some variation of the following elements: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[89] However, the First Amendment requires

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[87] Gleicher, *supra* note 11, at 331 (footnote omitted).
[88] *See* discussion *infra* Section IV.A.
[89] RESTATEMENT (SECOND) OF TORTS §558 (1977 & Supp. 2010).

more of a plaintiff to establish a viable claim for defamation if the plaintiff is considered a public figure.[90]

A. The Public Figure Doctrine

In a groundbreaking decision, the Supreme Court in *New York Times v. Sullivan* determined for the first time that, in order to protect critical aspects of First Amendment freedom, certain categories of plaintiffs should be subject to a higher standard to recover for defamation.[91] Under this heightened standard, a plaintiff who is considered a public official must establish that "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[92] In support of this conclusion, the Court noted, "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[93] Although the decision in *New York Times v. Sullivan* did not explain the outer boundary of the public official category, the Court subsequently stated that, at the very least, it includes "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[94]

In *Curtis Publishing Co. v. Butts*, the Supreme Court expanded the *New York Times v. Sullivan* holding beyond public officials to include allegedly defamatory statements made with regard to public figures.[95] In so holding, the Court noted that the logical foundation for a heightened standard for public officials was also relevant for individuals whose activities or involvement thrust them into a public controversy.[96] Thus, the Court created an additional category of plaintiffs

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[90] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-81 (1964).

[91] *Id.* at 279-80.

[92] *Id.*

[93] *Id*. at 270.

[94] Rosenblatt v. Baer, 383 U.S. 75, 85 (1965); *see also* W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 2 (2003).

[95] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) ("We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.").

[96] *Id*.

who must allege "actual malice" in a defamation suit—public figures. Some commentators have argued that this expansion is broad enough to cover celebrities, political leaders and corporations,[97] however, the Supreme Court has not explicitly endorsed these specific categories of public figures.

In an attempt to clarify the boundaries of the public figure doctrine, the Supreme Court, in *Gertz v. Welch*, described distinctive characteristics relating to the classification of public figures. It noted as relevant the voluntariness of plaintiff's status as a public figure[98] and plaintiff's level of "access to the channels of effective communication" that can be used to combat the reputational impact of negative statements.[99] Thus, under the *Curtis* and *Gertz* framework, a person may be considered an all-purpose public figure if they have voluntarily assumed a position in the public spotlight and acquired adequate status or power to combat the harms resulting from negative criticism. For example, athletes like Tiger Woods or entertainers like Conan O'Brien would likely qualify as all-purpose public figures. They both have voluntarily entered the public arena and acquired the requisite status and power to secure access to modes of popular media to combat negative speech.

Further, in *Gertz* the Court also identified a category of plaintiffs that it classified as limited-purpose public figures. These plaintiffs "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[100] Subsequently, in *Time v. Firestone*, the Court noted that "public controversy" was not simply defined as matters that create a "public interest."[101] Thus, if a plaintiff voluntary inserts himself into the public controversy regarding a specific issue, then he will have to allege "ac-

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[97] Gleicher, *supra* note 11, at 332.

[98] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) ("[It is assumed that] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual.").

[99] *Id.* at 344 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.") (citations omitted).

[100] *Id.* at 345.

[101] Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) ("Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."). *Firestone* involved the public divorce of members of a prominent United States industrial family, which was sensationalized by the media, including allegations of extramarital adventures by both parties.

tual malice," under *New York Times v. Sullivan*, for any defamation claims that arise in connection with that issue. However, the plaintiff will not have to meet the heightened burden for claims relating to other areas of his life because he remains a private individual with respect to those issues.[102] For example, American Airlines pilot, Chesley "Sully" Sullenberger, who landed a jet on the Hudson River in Manhattan,[103] would likely be considered a limited-purpose public figure because he injected himself into the public spotlight regarding the specific issue by conducting interviews and selling the rights to his story. Therefore, if someone alleged that the real cause of the emergency landing was Sully's old age and incompetence, then Sully would have to allege actual malice in order to recover for defamation. However, if someone alleged that he was a child molester because he liked to volunteer his time at a local elementary school, then Sully would only have to meet the evidentiary burden required by state law because the defamatory remarks related to an aspect of his life that is beyond the scope of his status as a limited-purpose public figure.

Finally, in *Gertz*, the Court indicated that there might be rare circumstances when a plaintiff could be classified as an involuntary public figure,[104] occurring in situations where a person is forced into the public debate without voluntarily assuming this status. Consider the following example: if a person is caught doing something on a cell phone camera, and that video is subsequently posted on the Internet, then a private person may be thrust into the public spotlight without any voluntary action.[105] However, because of the brevity in which the

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[102] *Gertz*, 418 U.S. at 349 (attempting to reconcile the notion of a limited-purpose public figure with the state's right to provide plaintiff recovery for actual injury in a defamation claim and noting that "[i]t is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved").

[103] *See* Michael Wilson, *Flight 1549 Pilot Tells of Terror and Intense Focus*, N.Y. TIMES, February 8, 2009, at A19.

[104] *Gertz*, 418 U.S. at 345 ("Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.").

[105] With the increase in mobile technologies, examples of this kind of involuntary public figure are numerous, including: the "Star Wars Kid," who was transformed into an Internet celebrity after his classmates took a copy of a video, during which he was performing Jedi moves, and posted it on the Internet without his permission; and the video of the South Korean woman who was videotaped refusing to pick up after her dog, after which she was referred to as "Poop Girl" and subjected to media scrutiny. *See* Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1025 (2009) (describing the notoriety and torment regarding the "Star Wars Kid"); Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. CHI. L. REV. 1407, 1429 (2009) (discussing the media attention surrounding the "Poop Girl" video).

Court discusses the concept of an involuntary public figure—it only devoted one sentence—there is debate over whether *Gertz* only created two types of public figures: (1) all-purpose and (2) limited-purpose, or whether it included a third category of involuntary public figures.[106] Further, while the Court identified that there may be rare instances in which a plaintiff is truly an involuntary public figure, the majority expressly rejected the notion that involuntary public figures should be subject to a higher burden if the speech involves a public issue.[107]

The *Gertz* opinion left many unanswered questions regarding the state of the involuntary public figure concept; however, despite the brevity of its discussion, after *Gertz* the Supreme Court decided three libel cases that at least considered the prospect of applying the involuntary public figure framework to private individuals.[108] Ultimately, the Court refused to find that the plaintiffs qualified as involuntary public figures, thus leaving unclear the question of when an individual would qualify under this category. The ambiguity expressed in *Gertz* and the subsequent reluctance by the Court to apply the concept in

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[106] *See generally* Hopkins, *supra* note 94, at 10-18.

[107] *Gertz*, 418 U.S. at 346 (The Supreme Court rejected the idea proposed by *Rosenbloom v. Metromedia* to expand the *New York Times v. Sullivan* test to include issues of general or public interest. The Court noted that such a conception would "forc[e] state and federal courts to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.'") (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)).

[108] *See* Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (Hutchinson sued for defamation after receiving an award for wasteful government spending. Despite substantial press regarding the award, the Court refused to classify the plaintiff as an involuntary public figure. The Court noted, "Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they point to concern about general public expenditures. But that concern…is not sufficient to make Hutchinson a public figure."); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979) (Petitioner was accused of espionage and subjected to intense media scrutiny after failing to appear in front of the grand jury. Despite this notoriety, the Court refused to classify him as a limited purpose public figure because he lacked the requisite voluntariness. Similarly, the Court rejected suggestions that it classify petitioner as an involuntary public figure, noting that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*…."); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976) (finding that, despite the notoriety surrounding a divorce between members of the prominent Firestone family, Mary Alice Firestone should not be required to allege "actual malice," even though she seemingly qualified as an involuntary public figure).

practice has sparked considerable debate among lower courts and scholars over whether the involuntary public figure doctrine is a necessary classification to protect important First Amendment freedoms, or whether it should be abandoned completely.[109]

B. Public Interest in the Public Figure Framework

Because this Note does not focus on whether courts should abandon the involuntary public figure doctrine, it is not necessary to decide that complicated issue. Even assuming that courts were to retain the concept—arguably there are more instances of involuntary notoriety than there were when the Court decided *Gertz*[110]—the more salient issue for dealing with claims of online defamation is whether the plaintiff is involved with an issue that can be considered of general or public interest.

The Supreme Court first addressed the possibility of requiring a plaintiff to assert actual malice if the allegedly defamatory speech related to a general or public issue in *Rosenbloom v. Metromedia, Inc*.[111] In *Rosenbloom*, the Philadelphia police arrested the petitioner for distributing nudist magazines in violation of the city's obscenity ordinances. The arresting officer called a local radio station with details of the incident, causing the station to broadcast stories about the arrest under titles such as "City Cracks Down on Smut Merchants."[112] The distributor sued the radio station and individual police officers for defamation. The distributor did not qualify as a public official or a public figure under the public figure framework at the time. Thus, the Court had to determine whether or not to expand the *New York Times v. Sullivan* standard to include private individuals who allege defamation with regard to matter of public concern. In support of such an expansion, the plurality noted that:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual

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[109] *See, e.g.*, Anaya v. CBS Broad. Inc., 626 F.Supp.2d 1158, 1207-11 (D.N.M. 2009) (discussing the judicial and scholarly opinion regarding the involuntary public figure doctrine); Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 559 (E.D. Mich. 1979) ("The continued vitality of this classification is called into serious question by the opinion in *Firestone*."); *but see, e.g.*, Hopkins, *supra* note 94, at 45-46 (arguing that the involuntary public figure doctrine is necessary to protect the press and reflects the state of modern society where all individuals are "public" to some degree).

[110] *See supra* note 105 and accompanying text.

[111] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), *abrogated* by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[112] *Id.* at 32-34.

> is involved, or because in some sense the individual did not 'voluntarily' choose to become involved….[T]he public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[113]

It appeared that the Court was willing to expand the traditional public figure doctrine to include not only an analysis of plaintiff's status, as a public official or public figure, but to also consider whether the private individual's conduct related to matters central to a robust public discourse and debate.

While not explicitly overruling *Rosenbloom*, the Court expressly backed off the public issue position just three years later in *Gertz v. Welch*, noting that "[t]he extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [the] legitimate state interest [in providing a legal remedy for defamatory falsehoods] to a degree that we find unacceptable."[114] A narrow majority refused to adopt a position that would subject private individuals to a higher evidentiary burden regardless of whether the allegedly defamatory speech related to a general or public interest.[115] The minority justices, however, each filed separate dissents advocating a spectrum of different approaches for balancing First Amendment freedoms against the right to recover for defamation.[116]

Justice Brennan's dissent specifically addresses the situation where a private individual alleges defamation in connection with an event that is of general or public interest. First, he notes that *Rosenbloom's* application of the *New York Times v. Sullivan* standard to certain private individuals is appropriate when it involves events of public or general interest.[117] In support of this contention, he states that the "guarantees of free speech and press necessarily reach far more than knowledge and debate about the strictly official activities of

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[113] *Id.* at 43-44 ("We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.").

[114] Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

[115] Justice Blackmun filed a concurrence in order to achieve a narrow 5-4 majority. Despite agreeing with the plurality in *Rosenbloom*, Justice Blackmun reversed course and voted against the public issue standard in order to eliminate uncertainty in defamation law, stating "[i]f my vote were not needed to create a majority, I would adhere to my prior view." *Id.* at 354.

[116] *See id.* at 354-403. On one extreme, Justice Douglas expressed the view "that the First Amendment would bar Congress from passing *any* libel law." *Id.* at 356 (Douglas, J., dissenting) (emphasis added).

[117] *Id.* at 361 (Brennan, J., dissenting).

various levels of government, for freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed…."[118] Further, Justice Brennan did not find it necessary to limit the analysis to the plaintiff's status as a public official or figure because issues of public or general interest do not become less important in First Amendment discourse simply because a private individual is involved.[119]

In responding to the majority, Justice Brennan notes that the traditional justifications for excluding a private plaintiff from the *New York Times v. Sullivan* standard—voluntariness and access to modes of communication—do not adequately reflect the reality of society and do not sufficiently protect important First Amendment freedoms. For example, citing to his position in *Rosenbloom*, he notes that while certain prominent public figures may have some ability to command media attention, "even then it is the rare case where the denial takes over the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."[120] Because there is no guarantee that the media outlets will want to run counter-criticism stories, as the subject may no longer be popular, in reality there is no concrete ability of public figures to command the media outlets.[121] Additionally, Justice Brennan rejects the majority's reliance on the voluntary aspect of plaintiff's position in determining defamation recovery in conjunction with the First Amendment. He expresses the view that "[s]ocial interaction exposes all of us to some degree of public view" and notes that the Court, "has observed that '[t]he risk of this exposure is an essential incident of life in a society which places a primary value on the freedom of speech and of press.'"[122]

Lastly, for Justice Brennan, allowing courts to determine what is and what is not an issue of general or public interest is not totally outside the bounds of a court's traditional role as arbiter of all disputes, including constitutional claims.[123] Although defining what constitutes issues of general or public interest necessarily requires broad discretion by judges, Justice Brennan pointed to the voluminous case law,

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[118] *Id.* at 362 (citations omitted).

[119] *Id.*

[120] *Id.* at 363 (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46-47 (1971)).

[121] *Id.* ("In the vast majority of libels involving public officials or public figures, the ability to respond through media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story.") (citation omitted).

[122] *Id.* at 364 (citing Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)).

[123] *Id.* at 368-69.

both before and after *Rosenbloom*, as guidance. Further, he noted that "[t]he public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the 'general or public interest' concept should be of far less concern to publishers and broadcasters than that occasioned by state laws imposing liability for negligent falsehood."[124] Under the general or public interest approach, the potential harms resulting from a broad definition of public interest—and thus an increased application of the *New York Times v. Sullivan* standard—is far less harmful than the effects of allowing private plaintiffs to allege mere negligence in order to recover for defamation, especially when the speech relates to important public discourse.

The Supreme Court created the original public figure doctrine during an era when traditional media sources dominated and plaintiffs typically had to take some action to enter into the public spotlight. However, classifying a plaintiff as a public figure in a defamation action has become considerably more complex when considering the digitization of today's society. Most people have put themselves online in some form, including social and professional networking, blogging, or participating in online chat rooms. Thus, the voluntariness aspect of the traditional public figure doctrine may not have the same force as it did when the Court decided *New York Times v. Sullivan.* Similar to the principles indicated in Justice Brennan's dissent in *Gertz*, reliance on a plaintiff's access to media simply cannot carry the same weight as before because of the ease of accessibility provided by the Internet[125] and the reality that all counter-criticisms responses will not meet their target because of the sheer amount of information available. Thus, from a First Amendment perspective, it is increasingly imperative that the Supreme Court reevaluate its defamation jurisprudence, moving the analysis away from reliance on the status of the plaintiff towards a determination of whether the speech involves an issue of general or public interest.

IV. INTERNET PUBLIC FIGURE DOCTRINE

There are two main principles underlying the traditional public figure doctrine: (1) the voluntary nature of the plaintiff's position or actions, and (2) the plaintiff's access to channels of communication used to counteract negative speech.[126] However, while commentators recognize that the Internet has split access to public discourse wide

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[124] *Id.* at 369.
[125] *See* discussion *supra* part I.
[126] *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

open,[127] there is stark disagreement about how to classify individual plaintiffs as private figures, voluntary public figures, involuntary public figures, or limited-purpose public figures.[128] Classification as a public figure is critical in the context of Internet defamation suits because the Supreme Court explicitly recognizes that there is a heightened evidentiary burden for plaintiffs who are categorized as public figures[129] and, consequently, this evidentiary burden is crucial for a plaintiff in overcoming a motion to quash a John Doe Subpoena. The standards used by courts in analyzing John Doe Subpoenas test the sufficiency of a plaintiff's defamation claim using various procedural proxies including, good faith, motion to dismiss, prima facie and summary judgment.[130] Thus, if a plaintiff is considered an Internet public figure, then he or she will have to plead enough facts to show that the alleged defamer acted with actual malice to satisfy the requisite procedural mechanism.

In addition to the pleading requirement, some commentators emphasize that the underlying rationales supporting the public figure doctrine—voluntariness and access to communication—are not necessarily as strong in the context of the Internet.[131] These critics argue that a broad definition of Internet public figures is contrary to the principles underlying traditional defamation law because it is difficult, if not impossible, to predict when and if someone will gain Internet

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[127] *See, e.g.*, Lidsky, *Silencing John Doe*, *supra* note 1, at 893 (discussing how access to the Internet has affected ability to engage in public discourse).

[128] *Compare* Gleicher, *supra* note 11, at 335-37 (arguing that failure to maintain a narrow definition of public figures online would result in reduced legal protection for plaintiffs who did not possess a remedial advantage to combat negative speech and did not voluntarily assume a public position), *and* Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 490-501 (1998) (rejecting the argument that all Internet users should be considered public figures), *with* Mike Goodwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 8 (1994) (arguing that the availability of the mass medium makes all Internet users public figures), *and* Miller, *supra* note 13, at 256-57 (arguing that a courts should maintain a broad definition of public figures online).

[129] *Sullivan*, 376 U.S. at 279-80 (Under this heightened standard, a plaintiff who is considered a public official must establish that "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

[130] *See, e.g.*, Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999) (motion to dismiss); Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005) (summary judgment); Dendrite Int'l, Inc. v. Doe, No.3, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) (prima facie); *In re* Subpoena Duces Tecum to Am. Online, Inc. (*In re* AOL), No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom.* Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001) (good faith).

[131] *See* Gleicher, *supra* note 11, at 334-36.

notoriety.[132] They argue that people obtain Internet popularity without taking any active steps to achieve that status,[133] which seems inconsistent with the justification that the evidentiary burden in defamation claims should be higher for plaintiffs who voluntarily assume the risk of public commentary and criticism. Further, critics of a broad definition argue that because most people have essentially the same access to the channels of Internet communication, the public figure possesses no real advantage over the private individual to remedy the reputational injury resulting from defamatory speech.[134]

However, increased accessibility encourages Internet users to undertake some voluntary action to inject themselves into online discourse. Thus, critics of a broad definition cannot rely on the traditional justifications of the public figure doctrine as a counterargument for an expanded definition of the Internet public figure doctrine because it does not align with the realities of the today's society. While some private individuals will inevitably be subject to involuntary public notoriety, the reality of interaction and activity on the Internet is probably more reflective of an active choice on behalf of the user to put their identity into cyberspace. Further, in an era in which traditional media sources are becoming a scarcity and important public discourse is hashed out on the Internet, the general or public interest approach, as opposed to the complicated analysis of a plaintiff's status, is both a more manageable standard for courts and is necessary for the protection of important First Amendment freedoms. This Note proposes the creation of an Internet public figure doctrine that uses aspects of both the majority and dissenting opinions in *Gertz*, focusing on an expanded definition of limited-purpose public figures and the consideration of whether or not the speech relates to an issue of general or public interest.

Under an expanded definition of a limited-purpose public figure, users would be considered public figures for all online activities relating to the user's participation in matters of public concern. If a user maintains a social networking page, participates in a political forum, or produces a personal blog, then the court should consider the plaintiff to be a limited-purpose public figure for any statements concern-

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[132] *Id.* at 335 (arguing that the lack of proactive steps required to become an Internet public figure "undermines the notion of voluntary accession to publicity that is inherent in the public figure doctrine").

[133] *See* discussion *supra* note 105 and accompanying text.

[134] Gleicher, *supra* note 11, at 334-36*; see also* Hadley, *supra* note 128, at 492-95 (arguing that the right to reply is not as meaningful on the Internet because while there is the ability to instantaneously respond in one's own words, it still requires an affirmative step to log on to the website to receive the reply).

ing a public issue made in relation to the user's voluntary online activity. For example, if a person sets up a Facebook page with links to various blogs she participates in, then she has created an online identity incorporating these various voluntary Internet activities. And, if she uses one of these resources to discuss her recent failure to secure a promotion at work because she was female and someone comments that she should have slept with even more of her superiors, then the court should consider her a limited-purpose public figure in a suit for defamation. Under this expanded view she would be a limited-purpose public figure for two reasons: (1) she voluntarily entered the public forum by creating various online identities, and (2) she used these outlets to inject herself into the public debate over gender issues in the workplace, in order to influence, or simply participate, in the resolution of a public issue.

If Internet users are considered limited-purpose public figures for their voluntary online activities, then some plaintiffs will have to offer evidence that the alleged defamer acted with the *New York Times v. Sullivan* standard of actual malice. Critics argue that this approach is flawed for various reasons. First, expanding the definition of limited-purpose public figures on the Internet would led to a disparate result between online plaintiffs and offline plaintiffs in a defamation suit.[135] Specifically, offline plaintiffs, who are not considered public figures under the traditional analysis, would have a lower evidentiary burden in seeking the identity of his or her alleged defamer than an online plaintiff who alleges defamation with regard to his or her Internet activity.[136] However, this argument fails to consider the vast changes in media and communications since the era of *New York Times v. Sullivan*. The traditional public figure doctrine relies on concepts of voluntariness and access to communications that are no longer relevant considerations for the Internet era.[137] Because the Internet creates a unique forum that encourages voluntary participation and eliminates the need for status to secure access to modes of communication, the argument that the analysis would be different for offline versus online

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[135] *See* Chilson, *supra* note 45, at 398-99.

[136] *Id.*

[137] The Internet requires that users take some voluntary action to engage in online activities and thus, the notion that plaintiff has voluntarily assumed the risk of criticism under the traditional public figure analysis is no longer a reliable indicator. Because the Internet provides free access to anyone with an Internet connection, the status of the plaintiff is not necessary to reach modes of communication to counter the criticism. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 361-65 (1974) (Brennan, J., dissenting) (describing how the "access to modes of communication" justification for classification as a public figure is flawed in terms of the realistic ability to counteract the negative comments).

plaintiffs is form rather than substance. Thus, the criticism that an expanded definition of limited-purpose public figure creates two separate standards for defamation misses the point because the Internet requires the Court to consider the inadequacy of the traditional public figure analysis in order to adequately protected First Amendment freedoms in the online context.

Critics also argue that an expansion of the limited-purpose public figure doctrine would persuade some people not to engage in online discourse because of the fear that they would not be able to recover, due to the heightened evidentiary burden, in the event that their reputation was defamed.[138] Practically speaking, critics argue that this would create a disincentive that would effectively "chill" some level of speech because online plaintiffs would have to allege actual malice to recover for defamation which would dissuade them from participating in online discourse. However, in reality the actual malice standard, arguably, has not had an effect on the private individual's decision to run for public office,[139] and there is no reason to believe that it would produce a chilling effect in the Internet context either.

This argument rests on the speculative premise that people value the right to an untarnished reputation over the desire to participate in public debate and discourse. For example, under this argument's rationale, a private individual would be reluctant to post commentary on a city's website forum regarding education cuts out of fear that, under the expanded limited-purpose public figure definition, they may have to allege actual malice in the future should another user defame him. However, it is unlikely that a person would engage in such an internal hypothetical litigation debate before participating in a discussion regarding an issue that has real consequences on the person's life. Further, because of the economic downturn, traditional media has undergone an unprecedented transition into the digital realm[140] and the public discourse regarding many important issues has manifested itself online. Thus, the argument that the expansion of the public figure

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[138] *See* Gleicher, *supra* note 11, at 335 (arguing that "[f]aced with reduced legal protection, potential speakers may avoid speaking if they risk transforming themselves into public figures"); Hadley, *supra* note 128, at 500 ("By simply entering the Internet, a person would subject herself to the New York Times actual malice standard. This creates a strong incentive to stay off the information superhighway.").

[139] Hadley, *supra* note 128, at 500 ("In all fairness this incentive [to stay off the Internet because of the fear of heightened burden] should not be overstated—the increased scrutiny of public officials under New York Times has not prevented everyone from running for office. The same may be true for users of the Internet.") (footnote omitted).

[140] *See* David Carr, *Mourning Old Media's Decline*, N.Y. TIMES, Oct. 29, 2008, at B1.

doctrine would discourage users from participating online because they would have a higher evidentiary burden is a stretch.

Despite advocating for an expansion of the limited-purpose public figure on the Internet, the issue is considerably more complex when considering plaintiffs who are truly involuntary public figures. While this argument may seem superfluous in light of the fact that many people have put themselves online in the professional, social or political context, there are still rare occasions when an individual is involuntarily thrust into the online public forum. The Internet notoriety surrounding a boy who taped himself doing moves from the Star Wars movies, which was later published without his permission by fellow classmates, illustrates an obvious example of a true involuntary public figure. Before long, the video went "viral" and the boy became known as the "Star Wars Kid."[141] Because the "Star Wars Kid" did not voluntarily inject himself into a public controversy, an application of the limited-purpose public figure framework is misplaced. And there is considerable support for the argument that adopting a general or public interest approach and requiring him to allege actual malice would be patently unfair under the circumstances.

Courts, however, should not adopt a blanket rejection of the general or public issue framework to involuntary public figures because doing so may foreclose important public discourse. Consider the following example: a lesbian student wants to attend senior prom with a female date, but is turned away by parents at the door and the whole incident is recorded using a cell phone camera. A few days later someone posts this footage on YouTube without the student's permission or knowledge (assume for this hypothetical that the student has not engaged in any online activity, such as Facebook, discussing this issue). The girl becomes an Internet celebrity and websites are created to discuss the issue of whether schools should be allowed to adopt anti-gay policies at school functions. Some of the posts contain derogatory remarks about the girl regarding her lesbian lifestyle.

Under the general or public interest approach advocated by Justice Brennan in his *Gertz* dissent, the student may have to allege actual malice against her alleged defamers if the court determines that the statements relate to a matter of public concern—gay and lesbian rights. Thus, the real issue is how the courts define general or public issue. If they define it broadly to include anything that sparks the public interest, then even the "Star Wars Kid" would likely have to allege

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[141] *See 'Star Wars Kid' Becomes Unwilling Internet Star*, USA TODAY, Aug. 21, 2003, available at http://www.usatoday.com/tech/webguide/internetlife/2003-08-21-star-wars-kid_x.htm (describing the notoriety surrounding the video despite the fact that the boy did not volunteer the video for Internet publication).

actual malice. On the other hand, if the courts follow the rationale in the limited-purpose public figure jurisprudence and limit the definition to issues related to the public controversy,[142] then any interest in the "Star Wars Kid" would likely fall outside the bounds requiring a heightened burden, but interest in the lesbian student would be included.

From a speech protective perspective, the Court should define general or public interest broadly to ensure that all opinions, even those disfavored or taboo, are part of the online public discourse and debate. Even though a broad definition would seemingly put an undue burden on plaintiffs like the female student, perhaps protecting those rights is better left for laws specifically targeted towards this kind of unwanted conduct, such as cyber bullying legislation.[143]

It is time for the Supreme Court to reconsider the principles underlying the traditional public figure doctrine in the context of the Internet. Reliance on the voluntary aspect of plaintiff's position in the public spotlight does not need to be completely abandoned, but simply modified to recognize the expanded prevalence of limited-purpose public figures on the Internet. Further, even in the absence of voluntary action the Court should hesitate to apply a blanket prohibition of actual malice for involuntary plaintiff when the statements relate to an issue of general or public concern. In recognizing the need to protect issues of general or public concern, the Court can resurrect the *Rosenbloom* doctrine, without eviscerating online defamation claims by limiting the *New York Times v. Sullivan* standard to issues that reflect public controversy. Readjusting the *Gertz* definition of a limited-purpose public figure to meet the concerns of an Internet driven society, as well as recognizing the importance of public discourse regardless of the voluntary action, adequately reflects the current concerns regarding online defamation and is necessary to protect important First Amendment freedoms.

V. CONCLUSION

The Internet offers an unprecedented medium for First Amendment speech, allowing the average user to reach a vast audience beyond the scope of what the Framers could have ever comprehended. Traditional sources of print and broadcast communication continue to fade away and yesterday's pamphleteer is replaced by today's blog-

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[142] *See* Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976).

[143] *See generally* Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651 (2009) (discussing the judicial response to cyberbullying and possible legislative responses).

ger. Despite the vast changes in the method of delivering one's message, the underlying importance of the right to speak anonymously is equally, if not more, important in the Internet context as it was throughout the history of First Amendment jurisprudence. In reality, the Internet provides a unique forum for critical public discourse with virtually no obstacles to user accessibility. Further, the ability to disseminate ideas anonymously without fear of reprisal allows the Internet to provide an outlet for important high value speech. However, not all online speech is deserving of robust First Amendment protection and sometimes an individual plaintiff is entitled to recover for reputational injury. The critical issue arises in deciding how to balance an individual's right to anonymous speech with the plaintiff's right to recover for cognizable harm.

Because online anonymous speech can often involve critical First Amendment freedoms, it is important for the courts to develop a uniform standard that allows both plaintiffs and defendants to predict what kinds of conduct will be subject to liability. To this point, most commentators have focused on the relative strengths and weaknesses of the various tests for granting John Doe Subpoenas. While analysis of these procedural mechanisms is undoubtedly important, it misses the fundamental point that the traditional public figure doctrine is no longer sufficient in the modern Internet age. In adopting a uniform approach, courts need to consider the inadequacies of the *New York Times v. Sullivan* standard when applied to the reality of today's Internet user. A modification of the traditional public figure doctrine that incorporates relevant online characteristics, such as the expansion of limited purpose public figures based on voluntary online activity is a step in the right direction. Further, beyond the classification of the plaintiff, it is important for courts to consider whether or not the speech underlying the claim relates to a matter of general or public interest in order to ensure robust First Amendment protection on the Internet. Thus, under the Internet public figure doctrine, certain online plaintiffs would have to meet a higher evidentiary burden in order to recover for defamation. Allowing the courts to consider whether the conduct relates to an issue of general or public concern is necessary to ensure that important First Amendment freedoms are adequately protected in this new and dominant medium.

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